IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 24, 2018
Lyle W. Cayce
Clerk

No. 17-70032

DEXTER JOHNSON,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:11-CV-2466

Before SOUTHWICK, GRAVES, and HIGGINSON, Circuit Judges.

PER CURIAM:*

Dexter Johnson, a Texas death row prisoner, filed a motion for a new trial seeking to reopen matters previously adjudicated by the district court in 2013. In the alternative, he sought equitable relief from the 2013 judgment. The district court denied Johnson's request for a new trial as untimely and dismissed his request for equitable relief as a successive habeas petition.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Johnson now requests a Certificate of Appealability. For the reasons that follow, we DENY Johnson's application.

FACTUAL AND PROCEDURAL BACKGROUND

Dexter Johnson was sentenced to death for the robbery, kidnapping, and murder of Maria Aparece. The facts surrounding Johnson's arrest, conviction, and post-conviction proceedings have been summarized in earlier decisions. *See Johnson v. Stephens*, 617 F. App'x 293, 295–99 (5th Cir. 2015). We detail here the specific procedural history relevant to his current application.

Having exhausted his state appellate and post-conviction remedies, Johnson petitioned the United States District Court for the Southern District of Texas for a writ of habeas corpus in 2011. He subsequently moved the district court to abate the proceedings to allow him to raise a number of ineffective assistance of counsel claims in state court or, in the alternative, permit him to amend his federal petition to include the claims. In two separate orders, the district court denied Johnson's motion and his habeas petition. The first order, entered in August 2013, denied relief for all of Johnson's claims except his claim under *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), for which the court directed additional briefing. In the same 2013 order, the district court also denied Johnson's request to abate or amend his petition. All that remained following the 2013 order was Johnson's claim under *Edwards*.

Although the district court had not yet issued a final judgment for the 2013 order, Johnson filed a notice of appeal seeking a Certificate of Appealability ("COA") on the issues denied by the order. Texas thereafter filed an unopposed motion to dismiss the appeal, arguing that an appeal was premature because the district court had not yet entered a final judgment and the parties were also still awaiting the district court's adjudication of Johnson's *Edwards* claim. We agreed and dismissed Johnson's appeal.

The district court entered its second order in June 2014. The court denied Johnson's *Edwards* claim but granted a COA for that issue. Further, the district court *sua sponte* denied a COA for the habeas claims denied in its August 2013 order because binding precedent foreclosed relief on those claims. The court then entered a final judgment on the same day. The final judgment denied Johnson's habeas petition and dismissed the case with prejudice.

Under the COA granted by the district court, Johnson appealed the court's denial of his *Edwards* claim. *Johnson*, 617 F. App'x at 299. Notably, Johnson simultaneously sought a COA to challenge the district court's 2013 order. Specifically, he argued that the district court erred in denying his other habeas claims and in denying his motion to abate the proceedings or amend his federal petition. *See id.* We affirmed the denial of Johnson's *Edwards* claim and denied his request for a COA. *Id.* at 305.

In June 2017, Johnson filed a motion for a new trial or rehearing under Federal Rule of Civil Procedure 59(a)(2), seeking to reopen the matters addressed in the 2013 order. He argued that his current motion was timely because the district court never entered a separate final judgment for the 2013 order. According to Johnson, the 2014 final judgment only encompassed the 2014 order issued that same day. Alternatively, Johnson moved the district court to revise its 2013 order as a form of equitable relief under Rule 60(d)(1), 28 U.S.C. § 2243, and Article III of the United States Constitution.

The district court denied Johnson's motion for a new trial, holding that its 2014 final judgment encompassed its 2013 order. Accordingly, Johnson's motion, filed nearly three years after the 2014 judgment, was untimely. Further, Johnson had waived any argument that the 2014 final judgment failed to encompass the 2013 order when he challenged the 2013 order in his appeal of the 2014 final judgment.

The district court also denied Johnson's request for equitable relief. Addressing only his request for equitable relief under Rule 60(d)(1), the district court held that his request should be dismissed as a successive habeas petition. Johnson then filed a motion for reconsideration, arguing that the district court failed to address his requests for equitable relief under Section 2243 and Article III. The district court denied Johnson's motion for reconsideration, holding that it had not addressed those requests because they were frivolous and without merit.

Johnson now seeks a COA from this court on the issues of the denial of the motion for a new trial and of his requests for equitable relief.

DISCUSSION

I. Motion for New Trial

We first discuss the parties' reliance on our traditional COA standard of review for a district court's denial of a habeas petitioner's claims, either on the merits or on procedural grounds. In both instances we ask whether reasonable jurists could debate the district court's basis for its holding on the underlying claims. *See Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). That is not the posture of this case. The district court did not deny Johnson's habeas claims, but rather his motion for a new trial; it already denied his habeas claims years earlier. Accordingly, our standard of review for the district court's denial of Johnson's motion for a new trial must reflect this procedural posture.

This case procedurally is similar to cases where the petitioner seeks a COA for a district court's denial of a Rule 60(b) motion for relief from a prior habeas judgment. There, we blend the COA standard with the standard for the underlying Rule 60(b) motion, asking whether "a jurist of reason could conclude that the district court's denial of [the petitioner's] motion was an abuse of discretion." *Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011).

Traditionally, we review the denial of a motion for a new trial under Rule 59 for abuse of discretion. *Benson v. Tyson Foods, Inc.*, 889 F.3d 233, 234 (5th Cir. 2018). Consequently, a COA may issue here only if a reasonable jurist could conclude that the district court abused its discretion in denying the petitioner's motion for a new trial. *See Hernandez*, 630 F.3d at 428.

A district court may, after the completion of a nonjury trial and upon a motion for a new trial, "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment." FED. R. CIV. P. 59(a)(2). Rule 59(b) mandates that the motion for a new trial "be filed no later than 28 days after the entry of judgment." Additionally, Rule 58(a) requires "[e]very judgment and amended judgment" to "be set out in a separate document."

Johnson argues that his motion for a new trial was timely because the district court's 2014 final judgment did not encompass its 2013 order dismissing the bulk of his habeas claims and his request to abate the proceedings or amend his petition. Essentially, he argues that because he requests a new trial for issues addressed in the 2013 order, the absence of a final judgment for that order makes his request for a new trial timely.

The district court held when denying relief that its 2014 final judgment served as the Rule 58(a) final judgment for its 2013 order. In its entirety, the 2014 final judgment states: "In accordance with the Court's Memorandum and Order of even date, this Court DENIES Dexter Johnson's petition for a writ of habeas corpus. This case is DISMISSED with prejudice. This is a final judgment." Johnson asserts that the 2014 final judgment was not a Rule 58(a) final judgment for the 2013 order because the "of even date" language limited the judgment's applicability to the 2014 order. We disagree.

In determining the finality of a judgment, the district judge's intention is "crucial." *Vaughn v. Mobil Oil Expl. & Producing Se., Inc.*, 891 F.2d 1195,

1197 (5th Cir. 1990). Hence, even when a judgment does not specifically refer to all pending claims, it will still be deemed final as to the unreferenced claims "if it is clear that the district court *intended*, by the [judgment], to dispose of all claims." *See McLaughlin v. Miss. Power Co.*, 376 F.3d 344, 351 (5th Cir. 2004). We look to the language of the judgment to decipher the court's intent. *See Armstrong v. Trico Marine, Inc.*, 923 F.2d 55, 58 (5th Cir. 1991). "When the district court 'hand[s] down a judgment couched in language calculated to conclude all claims before him,' that judgment is final." *Id.* (citation omitted).

Examining the language of the judgment here, we see the district court clearly intended the judgment to dispose of all Johnson's claims, including those from the 2013 order. The "of even date" language upon which Johnson relies is preceded by the phrase "[i]n accordance with the Court's Memorandum and Order." The Merriam-Webster dictionary defines the phrase as "in a way that agrees or follows (something, such as a rule or request)." MERRIAM-WEBSTER (online ed.). Although the judgment does refer specifically to the 2014 order, that reference is in the context of the court stating that the judgment was entered consistently with the 2014 order.

In the 2014 order, the district court referred to the 2013 order three times. The court twice noted that its 2013 order denied habeas relief on all of Johnson's claims except for his *Edwards* claim. The court later *sua sponte* denied Johnson a COA for the claims it considered in the 2013 order because "[c]lear and binding precedent foreclose[d] relief" on the claims. The court's entering of a final judgment "[i]n accordance with" the 2014 order, and its repeated references in the 2014 order to the 2013 order, sufficiently indicates that the court intended the final judgment to dispose of all of Johnson's claims.

In addition, Johnson treated the final judgment as covering both the 2013 and 2014 orders. On appeal from the 2014 final judgment, Johnson not only challenged the court's denial of his *Edwards* claim but also sought a COA

to determine whether the court erred when it denied in the 2013 order his abatement or amendment motion and remaining habeas claims. *See Johnson*, 617 F. App'x at 295. His briefing did not object to the lack of a final judgment for the 2013 order.

Johnson's treatment of the 2014 final judgment as covering the 2013 order is notable because "[t]he sole purpose of Rule 58's separate-document requirement [is] to clarify when the time for an appeal begins to run." *Ludgood v. Apex Marine Corp. Ship Mgmt.*, 311 F.3d 364, 368 (5th Cir. 2002). The requirement is "a safety valve preserving a litigant's right to appeal in the absence of a separate document judgment." *Baker v. Mercedes Benz of N. Am.*, 114 F.3d 57, 60 (5th Cir. 1997). Johnson's effort to obtain a COA for issues contained in the 2013 order shows that he treated the 2014 final judgment as the district court intended it, and that his right to appeal the 2013 order was indeed protected.

Reasonable jurists could not conclude that the district court's denial of the motion for new trial was an abuse of discretion. The motion filed nearly three years after the final judgment was untimely. *See* FED. R. CIV. P. 59(b).

II. Equitable Relief

Johnson seeks a COA to determine whether the district court erred in denying him equitable relief. He asserts that the proper standard of review is whether "jurists of reason could find it debatable whether the district court abused its discretion in denying" him equitable relief. Even assuming such a standard is appropriate, Johnson has not met it.

Johnson contends that he is entitled to equitable relief in the form of the district court's revising its judgment for the issues it considered in the 2013 order. He argues that such relief is cognizable under Rule 60(d)(1), Section 2243, and Article III. We look first to Rule 60(d)(1).

a. Rule 60(d)(1)

Rule 60(d)(1) provides that Rule 60 does not limit the district court's power to "entertain an independent action to relieve a party from a judgment, order, or proceeding." In granting relief, we require the presence of "fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense." *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 668 (5th Cir. Unit A July 1981) (quoting *Bankers Mortg. Co. v. United States*, 423 F.2d 73, 79 (5th Cir. 1970)). The advantage of an independent action is that it can be raised at any time, unlike a motion for a new trial. *See Bankers Mortg. Co.*, 423 F.2d at 78 n.13. That Rule, though, is affected by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). It requires courts to dismiss a "claim presented in a second or successive habeas corpus application under Section 2254 that was presented in a prior application." 28 U.S.C. § 2244(b)(1).

Prior to 2007, Rule 60(b) also contained the above-quoted language concerning independent actions now present in Rule 60(d)(1). *See* FED. R. CIV. P. 60(b) advisory committee's note to 2007 amendment. The identical language in Rule 60(b) was "deleted as unnecessary" in 2007. *See id.* Prior to its removal, we held that Rule 60(b)'s independent action language cannot "be made a vehicle for the relitigation of issues." *Bankers Mortg. Co.*, 423 F.2d at 79. Analyzing the same provision in the context of AEDPA, the Supreme Court has determined that allowing Rule 60(b) to be used "to present new claims for relief from a state court's judgment of conviction — even claims couched in the language of a true Rule 60(b) motion — circumvents AEDPA's requirement that a new claim be dismissed unless it relies on either a new rule of constitutional law or newly discovered facts." *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005). Under Section 2244, "any claim that has already been adjudicated in a previous petition must be dismissed." *Id.* at 529–30. A motion

brings "a 'claim' if it attacks the federal court's previous resolution of [the] claim *on the merits*." *Id.* at 532.

Johnson attempts to rely on Rule 60(d)(1) to challenge the merits of the district court's prior resolution of his claims. He cannot circumvent AEDPA by filing an independent action that seeks readjudication of his habeas claims.

b. Article III and Section 2243

Johnson argues that Article III provides a district court the equitable power to revisit or revise its own judgments in the interest of justice. Further, he argues that "[a] district court's Article III inherent equitable powers cannot be constrained by statute or rule." According to Johnson, AEDPA therefore negates a provision of the Constitution by requiring dismissal of successive habeas petitions. *See* § 2244(b)(1). In addition, Johnson relies on a provision of Section 2243 that requires district courts entertaining an application for a writ of habeas corpus to "dispose of the matter as law and justice require."

Although stated in generalities, Johnson's argument is essentially that Congress may not bar a petitioner from endlessly presenting the same habeas claim before a federal court under the guise of equitable relief. He cannot, however, cite to any Fifth Circuit or Supreme Court precedent interpreting or applying Article III or Section 2243 in such a fashion. Indeed, Johnson appears to have taken his argument near-verbatim from the amicus brief filed by the Federal Public Defender in *Gonzalez*. *See* Brief of the Office of the Federal Public Defender for the Middle District of Tennessee as Amicus in Support of Petitioner at 2, *Gonazlez v. Crosby*, 545 U.S. at 524 (No. 04-6432).

The district court did not err in concluding that Johnson's arguments were "wholly without merit."

The application for a Certificate of Appealability is DENIED.